JOSEPH ANTHONY & ANOR v. MUHAMAD ARIF MOHAMAD RASAT & ORS

HIGH COURT MALAYA, KUALA LUMPUR
LEONG WAI HONG JC
[WRIT SUMMON NO: WA-21NCVC-38-05-2018]
23 JUNE 2023

Abstract – *(i) Before a careless act could be said to be negligent, there must first exist a duty owed to the complainant. Section 7 of the Civil Law Act 1956 does not enable an administrator of the estate of a deceased to sue for breach of a duty of care to the deceased when conducting an autopsy. Section 7 only operates when the death of the deceased is caused by the wrongful act, neglect or default of the alleged tortfeasor; (ii) A defendant need not plead the limitation defence under s. 2 of the Public Authorities Protection Act 1948 and s. 7(5) of the Civil Law Act 1956 in order to rely on these two sections to dismiss a suit. The terms of limitation in these two sections are absolute and contain no exceptions. It is only when a defendant wants to rely on the defence of limitation under the Limitation Act 1953, which terms of limitation are not absolute but contain exceptions, that he must plead the limitation defence.*

TORT: *Duty of care – Breach – Allegations of breach committed by medical officer – Medical officer conducted post-mortem on dead body – Cause of death described as 'unascertained' – Body buried but later exhumed for second post-mortem – Second post-mortem disclosed that first post-mortem conducted by medical officer was negligent, incompetent and of no probative value – Whether medical officer conducting post-mortem examination on dead body qualified to carry out post-mortem – Whether medical officer owed duty of care to deceased – Whether medical officer owed duty of care to parents of deceased – Whether medical officer had been negligent, unprofessional and in dereliction of duties in performing post-mortem – Criminal Procedure Code, s. 331 – Civil Law Act 1956, ss. 7 & 8*

TORT: *Duty of care – Breach – Allegations of breach committed by police officer – Medical officer conducted post-mortem on dead body – Cause of death described as 'unascertained' – Body buried but later exhumed for second post-mortem – Second post-mortem disclosed that first post-mortem conducted by medical officer was negligent, incompetent and of no probative value – Whether police officer investigating death owed duty of care to deceased – Whether police officer owed duty of care to parents of deceased – Whether investigation negligently shoddy and unprofessional*

A ***TORT:*** *Misfeasance in public office – Breach of duties in public office – Post-mortem on dead body – Cause of death described as 'unascertained' – Body buried but later exhumed for second post-mortem – Second post-mortem disclosed that first post-mortem conducted was negligent, incompetent and of no probative value – Whether there was abuse of power and authority by public officers in carrying out*
B *post-mortem and investigation – Whether there was misfeasance in public office*

TORT: *Liability – Vicarious liability – Allegations of breach of duties committed by public officers – Post-mortem on dead body – Cause of death described as 'unascertained' – Body buried but later exhumed for second post-mortem – Second post-mortem disclosed that first post-mortem conducted was negligent, incompetent*
C *and of no probative value – Whether there was breach of duties by public officers in carrying out post-mortem and investigation – Whether Government of Malaysia vicariously liable*

LIMITATION: *Public Authorities Protection Act 1948 – Section 2 – Medical officer conducted post-mortem on dead body – Cause of death described as*
D *'unascertained' – Body buried but later exhumed for second post-mortem – Second post-mortem disclosed that first post-mortem conducted by medical officer was negligent, incompetent and of no probative value – Whether defence of limitation under s. 2 of Public Authorities Protection Act 1948 applicable*

E The first plaintiff was the father of one Dr Sebastian Joseph ('deceased') and was suing as the administrator of the deceased's estate and in his individual capacity as the father of the deceased. The deceased was a doctor who was found dead in his quarters in Langkawi, Kedah. A post-mortem was conducted on the deceased by the medical officer ('first defendant') on duty at Hospital Langkawi, Kedah ('hospital') and the deceased's cause of death
F was described as 'unascertained' ('first post-mortem'). His body was subsequently buried. Dissatisfied with the findings of the first port-mortem, the first plaintiff obtained an order from the High Court to exhume the remains of the deceased. A second post-mortem was carried out and the pathologists concluded that the first post-mortem conducted by the first
G defendant had been negligent, incompetent and of no probative value. In this suit, the first plaintiff sought general, special, exemplary and aggravated damages against the defendants, contending that: (i) the first defendant, the Director of the hospital ('second defendant') and the Director of the Kedah Health Department, Kedah ('third defendant') were negligent and had
H breached their duty of care; (ii) the police investigations by the fourth and fifth defendants into the deceased's death had been negligently shoddy and unprofessional; and (iii) the defendants had committed misfeasance in public office. The defendants denied any negligence and misfeasance and contended that (i) the liability of the second, third, fifth and sixth defendants were
I subject to ss. 5 and 6 of the Government Proceedings Act 1956; and (ii) the claim against the defendants was barred by limitation under s. 2 of the Public Authorities Protection Act 1948 ('PAPA'). The issues that arose were: (i) whether the first plaintiff was suing in his individual capacity as the father

of the deceased or as the administrator of the deceased or in both capacities; (ii) whether the first defendant was a person authorised under the Medical Act 1971 and qualified to conduct a post-mortem on the remains of the deceased; (iii) whether the first defendant ought to have conducted the post-mortem on the deceased, bearing in mind that he was a fellow colleague of the deceased; (iv) whether the first defendant ought to have conducted the post-mortem on the deceased, bearing in mind the background and circumstances of the suspicious nature of the death of the deceased; (v) whether the first defendant had been negligent, unprofessional and derelict in his duties in performing the post-mortem; (vi) whether the second and third defendants had been negligent and derelict in their duties in not ensuring a competent, qualified and professional person had conducted the first port-mortem on the deceased instead of the first defendant; (vii) whether the fourth defendant had been negligent in investigating all the facts and circumstances of the deceased's death; (viii) whether the fifth defendant failed to ensure that the fourth defendant had investigated all the facts and suspicious circumstances of the deceased's death; (ix) whether the Government of Malaysia ('sixth defendant') was vicariously liable for all the acts and/or omissions of the first to fifth defendants; (x) whether the claim against the defendants was barred by limitation under s. 2 of the PAPA; and (xi) whether the plaintiffs had suffered losses and whether they were entitled to damages.

Held (dismissing suit):

(1) The first plaintiff was only suing as the administrator of the deceased estate. He was not suing in his personal capacity as the father of the deceased for the following reasons: (i) in the intitulement of the writ of summons, the first plaintiff was pleaded as '… (Pentadbir Estet Sebastian a/l Joseph, Si Mati)'. If the first plaintiff was suing as both the administrator of the deceased's estate and in his personal capacity as the father of the deceased, the intitulement would have stated '… (menyaman bagi pihak sendiri dan sebagai Pentadbir Estet Sebastian a/l Joseph, Si Mati)'; and (ii) in his witness statement, the first plaintiff clearly stated 'I am the legal administrator of my late son's estate …'. (para 38)

(2) The first defendant was a person properly authorised in law under s. 331 of the Criminal Procedure Code ('CPC') to conduct a post-mortem on the remains of the deceased. As s. 331 of the CPC stated that the first defendant was a person authorised in law to conduct a post-mortem on the remains of the deceased, there was nothing wrong in law for him to do the autopsy. In any event, the father of the deceased had lodged a complaint to the Malaysian Medical Council ('MMC') that the post-mortem done by the first defendant had 'been

done very unprofessionally and not in accordance to accepted standards for conducting such post-mortems'. The complaint was dismissed as conveyed in a letter from the MMC to the father of the deceased. The father of the deceased applied for judicial review of the decision and the application was dismissed by the High Court. His appeal to the Court of Appeal was also dismissed. (paras 61-66)

(3) Section 7 of the Civil Law Act 1956 ('CLA') did not enable the first plaintiff, as the administrator of the estate of the deceased, to sue the first defendant for breach of duty of care to the deceased (if any) when conducting an autopsy. Section 7 of the CLA only bites when the death of the deceased was caused by the wrongful act, neglect or default of the first defendant. It was equally clear from the wording of s. 8 of the CLA that s. 8 dealt with certain causes of action which were already vested in the deceased prior to his death and which he would have been able to pursue but for his death. In this case, the deceased was already dead when the alleged negligent autopsy was conducted by the first defendant. So, the alleged act of negligence did not vest in the deceased prior to his death, as required under s. 8 of the CLA. The first plaintiff, as the administrator of the estate of the deceased, could not rely on ss. 7 and 8 of the CLA to sue the first defendant for any breach of duty of care to the deceased (if any) when conducting an autopsy. The autopsy was not conducted by the first defendant at the request of the first plaintiff. The first plaintiff did not pay the first defendant to do the autopsy. Thus, there was no legal proximity between the first plaintiff and the first defendant for a duty of care to arise. Any duty that the first defendant owed was a duty to the state, for the welfare of society and in the interest of public justice. Not to private individuals like the first plaintiff. The defendant owed no duty of care to the deceased and to the father of the deceased when conducting the autopsy. As no duty was owed, the issue of negligence did not arise and thus, the first defendant could not be said to be negligent when conducting the autopsy on the deceased. (paras 82-84, 87, 88, 125, 126, 129 & 130)

(4) For the same reasons no duty of care was owed by the first defendant to the first plaintiff when conducting an autopsy, the second and third defendants also owed no duty of care to the father of the deceased. Since no duty was owed, the second and third defendants had not been negligent or derelict in their duties. (paras 131 & 132)

(5) The first plaintiff had stated that his claim against the fourth defendant for negligence was as the father of the deceased. However, as it had been held that the first plaintiff's claim was not pleaded as the father of the deceased but as a claim filed on behalf of the estate of the deceased, this would mean that the first plaintiff had no valid claim

against the fourth defendant. There were sound public policy reasons not to impose on the fourth defendant a duty of care to the first plaintiff, as the father of the deceased, in investigating all the facts and circumstances of the deceased's death. The fourth defendant could not be said to be negligent in investigating all the facts and circumstances of the death. (paras 133-134 & 161-162)

(6) For the same reasons no duty of care was owed by the fourth defendant to the father of the deceased, the fifth defendant also owed no duty of care to the father of the deceased. Since no duty was owed, the fifth defendant had not been negligent to ensure that the fourth defendant had investigated all the facts and circumstances of the deceased's death. (paras 163 & 164)

(7) As the first to fifth defendants were not liable to the first plaintiff, the sixth defendant was not vicariously liable to the first plaintiff. (para 165)

(8) The defendants could rely on the defence of limitation under s. 2 of the PAPA although it was not pleaded in the defence. The act of shoddy investigation was not a single act. It was a series of acts. When you have a series of acts, limitation runs from the date the act, injury or damages ceases. The acts ended when the police, by a letter dated 17 August 2016, stated that the matter was not going to be investigated further. So, 36 months started from 17 August 2016. As the writ was filed on 11 May 2018, the claim against the fourth to sixth defendants in respect of the alleged negligent investigation by the fourth defendant, was not barred by s. 2(a) of the PAPA. (paras 172, 185, 186 & 187)

(9) The tort of misfeasance in public officer had not been made out. There was no evidence that the first and fourth defendants had abused their power and authority as public officers. The first defendant was authorised under the CPC to do the autopsy while the fourth defendant was authorised under the CPC to do the police investigation. (para 195)

(10) The first plaintiff was not entitled to damages against the defendants. (para 216)

Case(s) referred to:

Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang [1997] 2 CLJ 225 CA ***(refd)***

Alexandrou v. Oxford [1993] 4 All ER 328 ***(refd)***

Anns v. Merton London Borough Council [1978] AC 728 ***(refd)***

Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***

Credit Corporation (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

A *Dato' Ahmad Johari Tun Abdul Razak v. A Santamil Selvi Alau Malay & Ors And Other Appeals [2020] 7 CLJ 588 CA* ***(refd)***
Donoghue v. Stevenson [1932] AC 562 ***(refd)***
Ibrahim Mohideen Kutty v. Timbalan Menteri Dalam Negeri & Ors [2003] 6 CLJ 144 HC ***(refd)***
In Re Anthony Chang Kim Fook, Deceased [2007] 2 CLJ 362 HC ***(refd)***
B *In Re Loh Kah Kheng [1990] 1 CLJ 823; [1990] 2 CLJ (Rep) 156 HC* ***(refd)***
Karun Klasik Sdn Bhd v. Tenaga Nasional Bhd [2023] 3 CLJ 175 CA ***(refd)***
Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals [2018] 1 CLJ 585 FC ***(refd)***
Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor [2021] 6 CLJ 157 FC ***(refd)***
C *Kuan Hip Peng v. Yap Yin & Anor [1964] 1 LNS 69 FC* ***(refd)***
Lawyer v. Kernodle 721 F2d 632 (8th Cir 1983) ***(refd)***
LeJeune v. Causey 634 So 2d 34 (La CI App 1994) ***(refd)***
Lee Cheng Yee v. Tiu Soon Siang & Anor [2004] 1 CLJ 1 CA ***(refd)***
Mak Koon Yong & Anor v. Municipal Councillors, Malacca [1967] 1 LNS 98 HC ***(refd)***
PP v. Shanmugam & Ors [2002] 1 LNS 160 HC ***(refd)***
D *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals [2019] 3 CLJ 441 FC* ***(refd)***
Re Inquiry Into The Death Of Nora Anne Quoirin [2021] 1 SMC 347 ***(refd)***
Retnarasa Annarasa v. PP [2008] 4 CLJ 90 HC ***(refd)***
Robinson (Appellant) v. Chief Constable of West Yorkshire Police (Respondent) [2018] UKSC 4 ***(refd)***
E *Robinson v. Chief Constable of West Yorkshire Police [2018] 2 WLR 595* ***(refd)***
Saiman Umar v. Lembaga Pertubuhan Peladang [2015] 9 CLJ 153 FC ***(refd)***
Sambu Pernas Construction & Anor v. Pitchakkaran Krishnan [1982] CLJ 151; [1982] CLJ (Rep) 299 FC ***(refd)***
Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor [2007] 6 CLJ 245 FC ***(refd)***
F *Selvi Narayan & Anor (Administrators Of Estate Of Chandran Perumal; Deceased) v. Koperal Zainal Mohd Ali & Ors [2017] 5 CLJ 84 HC* ***(refd)***
Shahrudi Abidin v. Datuk Wira Abu Seman Yusop Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri Malaysia & Ors [2021] 1 CLJ 52 CA ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
G *Sutherland Shire Council v. Heyman (1985) 60 ALR 1* ***(refd)***
Tasja Sdn Bhd v. Golden Approach Sdn Bhd [2011] 3 CLJ 751 FC ***(refd)***
Teoh Meng Kee v. PP [2014] 7 CLJ 1034 CA ***(refd)***
Three Rivers District Council & Ors v. Governor And Company Of The Bank Of England (No 3) [2003] 2 AC 1 ***(refd)***
Tony Pua Kiam Wee v. Kerajaan Malaysia & Another Appeal [2019] 1 CLJ 365 CA ***(refd)***
H *Yew Bon Tew & Anor v. Kenderaan Bas Mara [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 PC* ***(refd)***
Zulkiflee SM Anwar Ulhaque & Anor v. Arikrishna Apparau & Ors [2013] 1 LNS 1264 CA ***(refd)***

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Legislation referred to:
Civil Law Act 1956, ss. 7(5), 8
Criminal Procedure Code, ss. 23, 329, 330, 331, 332, 333(1), (2), (3), 335(2), 337, 339(1), (2)
Government Proceedings Act 1956, ss. 5, 6
Limitation Act 1953, ss. 4, 6
Printing Presses and Publications Act 1984, s. 20
Public Authorities Protection Act 1948, s. 2(a)
Sedition Act 1948, s. 11

Other source(s) referred to:
Justice Leong Wai Hong, *Law in Literature and Literature in Law – A Study In Creativity,* July [2022] JMJ 30
S Parusuraman, *The Inroad of Coronial Inquest in the Malaysian Legal System*, Journal of Public Security and Safety, vol 2, No 2/2014 p 119

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For the defendants - Shazreen Nadia Zulkipli & Khairuddin Anhar; Jabatan Peguam Negara, Putrajaya

Reported by Lina E

JUDGMENT

Leong Wai Hong JC:

Introduction

[1] "Dead men tell no tales" is an idiom from the old Latin '*mortui non mordent*'. It attests to the 'wisdom' of killing one's enemies to prevent them from exposing one's dark secrets and misdeeds.

[2] For this reason, the state has always mandated an autopsy, also called a post-mortem examination, of the body of a person who has died in a sudden or unnatural manner or by violence pursuant to s. 330 of the Criminal Procedure Code Act 593 ("CPC"). The purpose is to determine the cause, mode, and manner of death.

[3] The trial before me raises issues of general importance in relation to a post-mortem examination of the body of a deceased and the related police investigation, which counsel told me has not been decided by our courts. The principal issues are:

(i) whether a doctor conducting a post-mortem examination on a dead body owes a duty of care to the deceased;

(ii) whether a doctor conducting a post-mortem examination on a dead body owes a duty of care to the parents of the deceased;

(iii) whether a police officer investigating a sudden death report owes a duty of care to the deceased; and

(iv) whether a police officer investigating a sudden death report owes a duty of care to the parents of the deceased.

[4] The other important questions are:

(i) whether the defendants can rely on the limitation defence set out in s. 2 of the Public Authorities Protection Act 1948 ("PAPA") if it has not been pleaded in the defence;

(ii) is the tort of misfeasance in public office the same as non-feasance in public office.

[5] The first plaintiff is the father of a deceased, Dr Sebastian a/l Joseph ("deceased"). He is suing as the administrator of the deceased's estate according to the description of the first plaintiff in the writ of summons. This is because the first plaintiff is pleaded as "Joseph a/l Anthony (No. K/P: 510324-08-5881) (Pentadbir Estet Sebastian a/l Joseph, Si Mati)".

[6] However, the first plaintiff contends that he is also suing in his individual capacity as the father of the deceased. The defendants disagree. This issue will be addressed by me in my judgment.

[7] The deceased was a medical doctor who worked at the Klinik Kesihatan Kuah, Langkawi, Kedah Darul Aman. He was found dead on 17 November 2010.

[8] The second plaintiff is the mother of the deceased. Counsel for the two plaintiffs had informed this court on 16 March 2023 that the second plaintiff wished to discontinue her claim. I accordingly had granted the order for the discontinuance of the claim of the second plaintiff.

[9] The first defendant was a medical officer on duty at Hospital Langkawi, Kedah Darul Aman who carried out the autopsy on the deceased.

[10] The second defendant was the Director of Langkawi Hospital.

[11] The third defendant was the Director of the Kedah Health Department, Kedah Darul Aman.

[12] The fourth defendant was a police investigation officer who investigated the death of the deceased.

[13] The fifth defendant is the Inspector-General of Police.

[14] The sixth defendant is the Government of Malaysia.

Court Pleadings

The Pleaded Case Of The First Plaintiff

[15] The pleaded case of the first plaintiff is as follows.

[16] The deceased was a medical doctor who worked at the Klinik Kesihatan Kuah, Langkawi, Kedah Darul Aman. He was found dead on 17 November 2010 in his quarters at No. 4072, Kuarters Baru Klinik Padang Matsirat, 07100 Langkawi, Kedah Darul Aman.

[17] A post-mortem was conducted on the deceased on 18 November 2010 by the first defendant ("first post-mortem") (pp. 37 to 40 of B1/the common bundle of documents) ("CBD") and his body was subsequently buried. The first defendant stated in his report on the first post-mortem that the deceased's cause of death was "unascertained" (p. 40 of the CBD).

[18] Dissatisfied with the finding of the first post-mortem, the first plaintiff subsequently obtained a court order from the Alor Setar High Court dated 7 January 2015 to exhume the remains of the deceased for a second post-mortem ("second post-mortem") to be conducted on the remains by a local forensic pathology expert and a foreign expert pathologist as well as an inquest inquiry to be held. (Pages 34 to 36 of the CBD).

[19] Prof Dr Kasinathan Nadesan from Pusat Perubatan Universiti Malaya and Dr Byron Collins from Australia carried out the second post-mortem.

[20] It is the first plaintiff's case that the two pathologists had concluded in their respective reports that the first post-mortem conducted by the first defendant had been negligent, incompetent and to be of no probative value. The report of Prof Dr Kasinathan Nadesan is at pp. 41 to 53 and the report of Dr Byron Collins is at pp. 66 to 78 of the CBD.

[21] The first plaintiff is suing the first to third defendants for negligence and breach of duty of care. (Paragraph 18 statement of claim).

[22] It is also the first plaintiff's case that the police investigation by the fourth and fifth defendant into the deceased's death had been negligently shoddy and unprofessional. (Paragraph 18 statement of claim).

[23] The first plaintiff also pleaded that the defendants had committed misfeasance in public office. (Paragraph 24 statement of claim).

[24] The first plaintiff prays for general damages, special damages, exemplary and aggravated damages, interest and costs. (Paragraphs 24 and 25 statement of claim).

The Pleaded Defence Of The Defendants

[25] The defendants deny any negligence was committed in the autopsy on the deceased and the police investigation into the death of the deceased.

[26] The defendants also deny they had committed misfeasance in public office.

[27] The defendants also plead that the liability of the second, third, fifth and sixth defendants are subject to ss. 5 and 6 of the Government Proceedings Act 1956.

[28] Although not pleaded in the defence, the defendants in their submissions after trial submitted that the first plaintiff's claim against the defendants is barred by limitation under s. 2 of the PAPA.

A **The Trial Process**

[29] The trial took five days on 13, 15, 21 and 22 February 2023 and 16 March 2023.

[30] Six witnesses were called for this trial. They are:

B (i) Mr Joseph a/l Anthony (PW1) first plaintiff.

(ii) Mr Kalliegan Anthony a/l Joseph (PW2) the deceased's brother.

(iii) Dr Richard Byron Collins (PW3) consultant forensic pathologist.

(iv) Dr Muhamad Arif bin Mohamad (DW1) first defendant.

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(v) Amran bin Ahmad Sirat (DW2) fourth defendant.

(vi) Dr Mohd Suhani Mohd Noor (DW3) pathologist.

[31] The first plaintiff filed a total of three written submissions. The defendants filed a total of four written submissions.

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[32] Oral submissions by counsel were held before me on 1 June 2023. Decision was reserved. I delivered my decision on 22 June 2023.

The Issues To Be Tried Agreed By The Parties

E **[33]** The issues to be tried agreed by the parties dated 16 December 2022 to be determined by this court are:

(i) whether the first defendant is a person authorised under the Medical Act and qualified to conduct a post-mortem on the remains of the deceased on 18 November 2010;

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(ii) whether the first defendant ought to have conducted the post-mortem on the deceased bearing in mind that he was a fellow colleague of the deceased at Langkawi;

(iii) whether the first defendant ought to have conducted the post-mortem on the deceased bearing in mind the background and circumstances of the suspicious nature of the death of the deceased in this case;

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(iv) whether the first defendant had been negligent, unprofessional and derelict in his duties in performing the post-mortem on the deceased wherein he had determined the deceased's cause of death to be "unascertained";

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(v) whether the second and third defendants had been negligent and derelict in their duties in not ensuring a competent, qualified and professional person had conducted the first post-mortem on the deceased instead of the first defendant;

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(vi) whether the fourth defendant had been negligent in investigating all the facts and circumstances of the deceased's suspicious death;

(vii) whether the fifth defendant had failed to ensure that the fourth defendant had investigated all the facts and suspicious circumstances of the deceased's death;

(viii) whether the sixth defendant is vicariously liable for all the acts and or omissions of the first, second, third, fourth and fifth defendants;

(ix) whether the plaintiffs' claim against the defendants is barred by limitation under s. 2 of the PAPA;

(x) whether the plaintiffs had suffered losses as stated in their statement of claim and whether they are entitled to all the damages as prayed for therein against all the defendants.

Additional Issue That Arose During Post-trial Oral Submissions Before Me

Is The First Plaintiff Suing In His Individual Capacity As The Father Of The Deceased Or Suing As The Administrator Of The Deceased's Estate Or Suing In Both Capacities?

[34] Before I consider the agreed issues, I will need to decide whether the first plaintiff is suing:

(i) in his personal capacity as the father of the deceased; or

(ii) suing as the administrator of the deceased's estate pursuant to s. 8 of the Civil Law Act 1956; or

(iii) suing both in his capacity as an administrator of the deceased's estate pursuant to s. 8 of the Civil Law Act 1956 and in his personal capacity as the father of the deceased.

[35] This issue now arises as counsel for the first plaintiff in his written submissions in reply dated 29 May 2023 (encl. 112) at para. 2(i) says he had wrongly submitted earlier in court on 16 March 2023 that, quote, "the claim had been brought by the plaintiff pursuant to s. 8 of the Civil Law Act 1956". Unquote.

[36] This is what he now says in his written submissions in reply dated 29 May 2023 (encl. 112) at para. 2(i):

> On the 16.3.2023 *ie*, on the last day of trial, we had submitted in response to a query posed to us by court for which we had responded by stating that the claim had been brought by the Plaintiff pursuant to Section 8 of the Civil Law Act 1956. We have since perused the pleadings and **now stand corrected** on the actual position of the Plaintiff's claim. The Plaintiff's claim **had been both** in his capacity as an administrator for the estate pursuant to Section 8 of the Civil Law Act 1956 **and** in his personal capacity as the father of the deceased. We further submit that there is **no bar** to stop the Plaintiff in instituting the civil claim against the Defendants **personally**. The loss and damage accrued to the Plaintiff in the case had been clearly pleaded to be so. (emphasis added)

[37] The defendants' counsel in oral submissions before me on 1 June 2023 replied that the first plaintiff's counsel only retracted his admission and changed his stand after reading the defendants' written submissions which contain cases that show clearly that the first plaintiff has no valid claim as an administrator for the estate pursuant to s. 8 of the Civil Law Act 1956.

Court's Analysis

[38] I am of the view the first plaintiff is only suing as the administrator of the deceased's estate. He is not suing in his personal capacity as the father of the deceased. My reasons are as follows:

(i) in the intitulement of the writ of summons, the first plaintiff is pleaded as "Joseph a/l Anthony (No. K/P: 510324-08-5881) (Pentadbir Estet Sebastian a/l Joseph, Si Mati)";

(ii) if the first plaintiff is suing both as the administrator of the deceased's estate and suing in his personal capacity as the father of the deceased, the intitulement of the writ of summons would have stated "Joseph a/l Anthony (No. K/P: 510324-08-5881) (**menyaman bagi pihak sendiri dan sebagai** Pentadbir Estet Sebastian a/l Joseph, Si Mati)"; (emphasis added) and

(iii) in the witness statement of the first plaintiff at Q and A 3, he stated clearly:

> Q3: In what capacity have you brought this civil suit against the defendant?
>
> A3: I am the legal administrator of my late son's estate which the High Court of Kuala Lumpur had granted on 15 April 2015.
>
> A copy of the grant of letters of administration can be seen at p. 2 of the IDB.

For The Purposes Of Completeness And For An Appeal If Any From My Decision

[39] In any event, for the purposes of completeness and for an appeal if any from my decision, I shall still consider the suit on the basis the first plaintiff has brought his claim both in his capacity as an administrator of the deceased's estate pursuant to s. 8 of the Civil Law Act 1956 and in his personal capacity as the father of the deceased.

The Ten Agreed Issues To Be Tried

[40] I will now proceed to consider the ten agreed issues to be tried in the order as agreed by the parties.

Agreed Issue (i) – Whether The First Defendant Is A Person Authorised Under The Medical Act And Qualified To Conduct A Post-mortem On The Remains Of The Deceased On 18 November 2010

The Law

[41] To understand agreed issue (i) and the issues in this trial, it is useful that I set out the legal procedure that is activated from the time of discovery of the death of a person, to the police investigation into the death of that person and then the autopsy conducted on the deceased and the subsequent coronial inquest under Malaysian law.

Observations On The Rules Governing Coronial Inquest, Police Investigation Into The Death Of A Person And Autopsy Under Malaysian Law

Coronial Inquest

[42] A useful article on the origin of the coronial inquest in England and the setting up of the Coroner's Courts for Penang and Singapore in 1878 is *The Inroad of Coronial Inquest in the Malaysian Legal System* by S Parusuraman in the Journal of Public Security and Safety Vol 2 No 2/2014 p. 119. This article also has a useful analysis of the laws governing death inquires, relevant sections of the CPC that deal with coronial inquests, police power of investigation, the power of a Magistrate to hold an inquiry into deaths and the role of the Public Prosecutor in an inquest.

Relevant Sections On Inquiries Of Deaths In The CPC

[43] The relevant sections on inquiries of deaths in the CPC are from ss. 329 to 333.

Duty Of Police Officer To Investigate Death

[44] Section 329 of the CPC states that *a police officer shall immediately proceed to investigate when a police station receives information that a person has committed suicide, was killed by another, or by an animal, or by machinery, or by an accident, has died of foul play, has died of an unknown cause, or has died a sudden death.* A report will then be drawn by the said police officer and immediately forwarded to the Magistrate of that locality. (emphasis added)

Duty Of Officer To Arrange For Post-mortem Examination In Certain Cases

[45] Section 330 of the CPC states that if **the said police officer** suspects that the deceased came by his death in a sudden or unnatural manner or by violence or that his death resulted in any way from or was accelerated by any unlawful act or omission on the part of any other person, at once inform the nearest Government Medical Officer and, **shall send the body to the nearest Government hospital** or other convenient place **for the holding of a post-mortem examination of the body by a Government Medical Officer.** (emphasis added)

A Post-mortem Examination Of Body

[46] Section 331 of the CPC states that *a Government Medical Officer shall, as soon as practicable, make a post-mortem examination of the body of the deceased.* The medical officer, if it is necessary in order to ascertain the cause of death, shall extend the examination to the dissection of the body and an analysis of
B any portion of it, and may cause any portion of it to be transmitted to the Institute for Medical Research. (emphasis added)

Report Of Government Medical Officer

[47] Section 332 of the CPC states that *the medical officer* making any such
C examination shall draw up a report of the appearance of the body and of the conclusions which he draws from it, and *shall certify as to the cause of death* and shall date and sign the report and transmit it to the officer in charge of the police district. (emphasis added)

Duty Of Magistrate On Receipt Of Report

D

[48] Section 333(1) of the CPC states that *if the Magistrate is satisfied as to the cause of death without holding an inquiry, he shall report to the Public Prosecutor the cause of death with his reasons for being so satisfied* and transmit to the Public Prosecutor all reports and documents in his possession connected with the matter. (emphasis added)

E

[49] Sections 333(2) and (3) of the CPC state that *in all other cases the Magistrate shall proceed to hold an inquiry.* However, it is not necessary to hold any inquiry or to make any report to the Public Prosecutor if any criminal proceedings have been instituted against any person in respect of the death
F of the deceased. (emphasis added)

Inquiries To Be Made By Magistrate

[50] Section 337 of the CPC states that *a Magistrate holding an inquiry shall inquire when, where, how and after what manner the deceased came by his death and also whether any person is criminally concerned in the cause of the death.*
G (emphasis added)

Powers Of Magistrate

[51] Pursuant to s. 335(2) of the CPC, a *Magistrate holding an inquiry can issue an order to a medical officer to make a second post-mortem examination* of
H the body, and may for that purpose order the body to be exhumed. (emphasis added)

Power Of Public Prosecutor To Require Inquiry To Be Held

[52] Notwithstanding s. 333(1) of the CPC, pursuant to s. 339(1) of the
I CPC, *the Public Prosecutor may at any time direct a Magistrate to hold an inquiry* into the cause of, and the circumstances connected with, any death referred to in s. 329. (emphasis added)

[53] Pursuant to s. 339(2) of the CPC, *notwithstanding that any inquiry has been closed,* if it appears to the Public Prosecutor that further investigation is necessary, *the Public Prosecutor may direct the Magistrate to reopen the inquiry and to make further investigation.* (emphasis added)

Coroner's Court

[54] From the above-cited sections of the CPC, it is clear that the powers and duties of what is known traditionally as a Coroner's Court are now assumed by the Magistrates' Court under the CPC. (See *Re Inquiry Into The Death Of Nora Anne Quoirin* [2021] 1 SMC 347, *Retnarasa Annarasa v. PP* [2008] 4 CLJ 90; [2008] 8 MLJ 608 Mohamed Apandi Ali J, *PP v. Shanmugam & Ors* [2002] 1 LNS 160 Suriyadi Halim Omar J and *In Re Loh Kah Kheng* [1990] 1 CLJ 823; [1990] 2 CLJ (Rep) 156 Mohamed Dzaiddin J).

[55] For inquiries into sudden death and death investigation, they are held before a Sessions Court Judge called a Coroner. (See the Practice Direction of the Chief Justice No. 2 of 2019).

[56] At the conclusion of the inquiry, the Coroner must deliver a verdict. There are five possible verdicts:

(i) an open verdict (the evidence 'does not fully or further disclose the means whereby the cause of death arose/mati yang tidak dapat ditentukan cara kematian);

(ii) misadventure (mati akibat kemalangan);

(iii) natural death (mati akibat penyakit);

(iv) homicide (mati akibat perbuatan orang lain); or

(v) suicide (mati akibat perbuatan sendiri).

(See the Practice Direction of the Chief Justice No. 2 of 2019, *Teoh Meng Kee v. PP* [2014] 7 CLJ 1034, *Re Inquiry Into The Death Of Nora Anne Quoirin* [2021] 1 SMC 347, *In Re Anthony Chang Kim Fook, Deceased* [2007] 2 CLJ 362 Sulong Matjeraie J and *PP v. Shanmugam & Ors* [2002] 1 LNS 160 Suriyadi Halim Omar J).

Analysis Of The Court

[57] Section 331 of the CPC states clearly that a Government Medical Officer shall, as soon as practicable, make a post-mortem examination of the body of the deceased. The medical officer, if it is necessary in order to ascertain the cause of death, shall extend the examination to the dissection of the body and an analysis of any portion of it, and may cause any portion of it to be transmitted to the Institute for Medical Research.

[58] In the instant case, it is not disputed by the parties that the first defendant is a Government Medical Officer. (See defendants' written submissions para. 60 and WS DW1 Q and A 4).

[59] Under cross-examination, the first plaintiff also agreed that the first defendant was authorised under the law to conduct the autopsy on the deceased. At NOP p. 8:

SN Thus under the law the First Defendant Dr. Arif is allowed to conduct the post-mortem, you agree or not?

PW1 Yes, I agree.

SN And the post-mortem conducted against your late son was upon fulfilling a requirement provide under that law? You don't understand this question okey?

PW1 Ya.

CT Repeat the question.

SN I try to rephrase. But if you can understand just retreat the question. Technically when First Defendant Dr. Arif conducted the post-mortem he perform a duty provided under the law which require him to conduct the post-mortem as a government medical officer? It's a duty under the law.

PW1 Ya.

[60] The first plaintiff in his written submissions in reply at para. 12 also admitted, and I quote, "the law allows the first defendant to carry out the said first post mortem", unquote.

Answer On Agreed Issue (i)

[61] In conclusion, on agreed issue (i), it is my view the first defendant is a person properly authorised in law under s. 331 of the CPC to conduct a post-mortem on the remains of the deceased on 18 November 2010.

[62] I will now move on to consider agreed issues (ii) and (iii) together as they are related.

Agreed Issue (ii) – Whether The First Defendant Ought To Have Conducted The Post-mortem On The Deceased Bearing In Mind That He Was A Fellow Colleague Of The Deceased At Langkawi

Agreed Issue (iii) – Whether The First Defendant Ought To Have Conducted The Post-mortem On The Deceased Bearing In Mind The Background And Circumstances Of The Suspicious Nature Of The Death Of The Deceased In This Case

[63] In my view as s. 331 of the CPC states that the first defendant is a person authorised in law to conduct a post-mortem on the remains of the deceased, there is nothing wrong in law for him to do the autopsy.

[64] In any event, the father of the deceased had lodged a complaint to the Malaysian Medical Council by a letter dated 18 August 2016 alleging that the post-mortem done by the first defendant had "been done very unprofessionally and not in accordance to accepted standards for conducting such post mortems. Please find enclosed the conclusions of Dr Richard Bryon Collins as per the enclosed report …". (See B2 p. 1).

[65] After a hearing, the complaint was dismissed as conveyed in a letter dated 20 November 2020 from the Malaysian Medical Council to the father of the deceased. (See B2 pp. 131 to 168).

[66] The father of the deceased applied for judicial review of the decision. This was dismissed by the High Court. The father of the deceased appealed to the Court of Appeal but the appeal was dismissed. (See B2 p. 129).

Answer For Agreed Issues (ii) And (iii)

[67] To answer agreed issues (ii) and (iii), it is my finding, there is nothing wrong in law for the first defendant to do the autopsy on the deceased.

Agreed Issue (iv)– Whether The First Defendant Had Been Negligent, Unprofessional And Derelict In His Duties In Performing The Post-mortem On The Deceased Wherein He Had Determined The Deceased's Cause Of Death To Be "Unascertained"

The First Plaintiff's Contentions

[68] The first plaintiff asserts that the first defendant owes a duty of care to the deceased.

[69] He submits that administrators of the deceased's estates regularly initiate claims against tortfeasors. He further submits that examples of such instances would be in fatal motor vehicle accidents, custodial death cases and even medical negligence cases resulting in deaths. (See plaintiffs' written submissions at paras. 15 to 18 and 25 to 28).

[70] The first plaintiff relies on s. 8 of the Civil Law Act 1956 which reads:

> Effect of death on certain causes of action
>
> 1) Subject to this section, **on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:** Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery.
>
> (emphasis added)

[71] The first plaintiff also asserts that the first defendant had breached such duty of care as he was negligent when conducting the autopsy on the deceased.

[72] He relies on the post-mortem report dated 29 February 2016 and testimony of Dr Richard Byron Collins (PW3) consultant forensic pathologist based in Australia (exh. H encl. no. 77).

[73] He also relies on the post-mortem report dated 13 March 2017 of Prof Dr Kasinathan Nadesan Senior Consultant Forensic Pathologist, University of Malaya. (B1 pp. 41 to 53).

The Defendants' Contentions

[74] The defendants contend that no duty was owed by the first defendant towards the deceased as he was not a patient but was already deceased. (See defendants' written submissions paras. 52 and 64).

[75] The defendants also contend that ss. 7 and 8 of the Civil Law Act 1956 are not relevant to this case. (See defendants' written submissions paras. 9 to 42).

[76] In any event, the defendants contend that even if a duty of care is owed there was no negligence committed by the first defendant. (See defendants' written submissions paras. 68 to 106).

Analysis Of The Court

Can The First Plaintiff Rely On ss. 7 And 8 Of The Civil Law Act 1956 To Sue The First Defendant For Breach Of A Duty Of Care To The Deceased When Conducting An Autopsy?

[77] I now proceed to examine whether the first plaintiff can rely on ss. 7 and 8 of the Civil Law Act 1956 to sue the first defendant for breach of a duty of care to the deceased when conducting an autopsy.

[78] Section 7 of the Civil Law Act 1956 reads as follows:

> **Part III**
>
> **Fatal Accidents And Survival Of Causes Of Action**
>
> Compensation to the family of a person for loss occasioned by his death
>
> 7(1) **Whenever the death of a person is caused by wrongful act, neglect or default,** and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code [Act 574]. (emphasis added)

[79] Section 8 of the Civil Law Act 1956 reads as follows:

Effect of death on certain causes of action

1) Subject to this section, **on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:** Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery. (emphasis added)

The Historical Genesis Of ss. 7 And 8 Of The Civil Law Act 1956

[80] The Federal Court in *Sambu Pernas Construction & Anor v. Pitchakkaran Krishnan* [1982] CLJ 151; [1982] CLJ (Rep) 299; [1982] 1 MLJ 269 has set out the historical genesis of ss. 7 and 8 of the Civil Law Act 1956.

[81] Salleh Abas FJ said at p. 302 (CLJ); p. 270 (MLJ):

At common law the death of a person gives rise to two principles. The first is that the death of any person is not a civil wrong. Therefore, no action can be founded on it although death may result in pecuniary losses or damages to the deceased's spouse and children. Lord Ellenborough C.J. in *Baker v. Bolton* (1808) 1 Camp 493 ruled that "in a civil court the death of a human being could not be complained of as an injury." The second principle was that when a person died any cause of action which was vested either in his favour or against him at the time of death was buried with him. In other words, the cause of action did not survive the death: "*actio personalis moritur cum persona*". *The first principle which regarded death as not giving rise to any cause of action was rectified by section 1 of the Fatal Accidents Acts 1846 to 1959, popularly known as Lord Campbell's Act* whilst *the second principle which dealt with the non-survival of the cause of action was rectified by the Law Reform (Miscellaneous Provisions) Act, 1934. The provisions of these two UK statutes are now incorporated in sections 7 and 8 of our Civil Law Act, 1956.* (emphasis added)

Application To Facts

[82] In my view, s. 7 of the Civil Law Act 1956 does not enable the first plaintiff as administrator of the estate of the deceased to sue the first defendant for breach of a duty of care to the deceased (if any) when conducting an autopsy.

[83] This is because s. 7 only bites when the death of the deceased is caused by the wrongful act, neglect or default of the first defendant. In the instant case, the deceased was already dead when the alleged negligent autopsy was conducted by the first defendant. (See s. 7 of the Civil Law Act 1956 and *Sambu Pernas Construction & Anor v. Pitchakkaran Krishnan* [1982] CLJ 151; [1982] CLJ (Rep) 299; [1982] 1 MLJ 269 at 270).

[84] It is equally clear from the wording of s. 8 of the Civil Law Act 1956 that s. 8 deals with certain causes of action which were already vested in the deceased prior to his death and which he would have been able to pursue,

but for his death. (See *Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals* [2018] 1 CLJ 585 at (90) and (124 to 125) and *Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor* [2021] 6 CLJ 157; [2021] 3 MLJ 365 at 109 to 114).

[85] In *Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals* [2018] 1 CLJ 585 at (90) and (124 to 125), Zaharah Ibrahim FCJ said:

> [90] An action brought under s. 7 must be distinguished from an action brought under s. 8 of the CLA. **Section 8 deals with certain causes of action which were already vested in the deceased person prior to his death** and which he would have been able to pursue, but for his death. Those causes of action are not limited to causes of action arising from the wrongful act, neglect or default which resulted in his death. While at common law these causes of action would have died with him, under s. 8 (which incorporates provisions as in the Law Reform (Miscellaneous Provisions) Act 1934 of the United Kingdom) those causes of action survive for the benefit of the deceased person's estate.
>
> …
>
> [124] It bears repeating that by s. 8 of the CLA on the death of a person all causes of action subsisting against or vested in him survive against or for the benefit of his estate, except for certain causes of action. But for s. 8, those causes of action would die with him.
>
> [125] Clearly therefore **the causes of action that are saved by s. 8 must be causes of action that existed prior death.** Acts done or omitted to be done in relation to a person after his death cannot possibly give rise to any cause of action that could vest in him prior to his death.
>
> (emphasis added)

[86] In *Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor* [2021] 6 CLJ 157; [2021] 3 MLJ 365 at 109 to 114 Rhodzariah Bujang FCJ said:

> [113] Zaharah Ibrahim, FCJ further reiterated that: [105] As was explained by this court in *Sambu Pernas,* causes of action vested in a person survive his death solely due to s 8 of the CLA. Such survival is subject to the conditions set out in that section, one of which is that damages which can be awarded for the benefit of the estate of such deceased person cannot include exemplary damages. As was also stated in ***Sambu Pernas,*** **the claim of a person claiming on behalf of the estate of a deceased person under s 8 must 'stand and fall' on the basis of that section.**
>
> [114] **In short, Her Ladyship held that the only law available to a claimant suing on behalf of the estate of a deceased person is the Civil Law Act 1956** ('the CLA') and that includes the limitation prescribed by the Act in its s 8. The question posed was therefore answered in the affirmative by Her Ladyship. (emphasis added)

[87] In our case, the deceased was already dead when the alleged negligent autopsy was conducted by the first defendant. So, the alleged act of negligence did not vest in the deceased prior to his death as required under s. 8 of the Civil Law Act 1956.

[88] In conclusion, the first plaintiff as administrator of the estate of the deceased cannot rely on ss. 7 and 8 of the Civil Law Act 1956 to sue the first defendant for any breach of duty of care to the deceased (if any) when conducting an autopsy.

Does The First Defendant Owe A Duty Of Care To The Deceased And Also To The Father Of The Deceased Under Common Law When Conducting An Autopsy?

[89] I now move on to consider the issue whether the first defendant owes a duty of care to the deceased and to the father of the deceased under common law when conducting an autopsy.

[90] I will start with the duty of care to the deceased first before I consider the issue whether a duty of care is owed to the father of the deceased.

Whether The First Defendant Owes A Duty Of Care To The Deceased When Conducting An Autopsy

[91] The deceased was already dead when the autopsy was conducted. In my view, no duty of care can be owed to a dead person as he is an inanimate entity.

[92] In any event, the first plaintiff had conceded during oral submissions before me and in his written submissions in reply at para. 10 that, quote, "The plaintiff never pleaded that a duty was owed by the first defendant towards the deceased." Unquote.

Whether The First Defendant Owes A Duty Of Care To The Father Of The Deceased When Conducting An Autopsy

[93] Under Malaysian law, before a careless act can be said to be negligent, there must first exist a duty to the individual complaining.

[94] This point of importance was highlighted by Azahar Mohamed FCJ in the leading case of *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441 where His Lordship stressed that it is irrelevant that the acts complained of are careless or not in accordance with good professional practice:

> [89] *The Court of Appeal seemed to hold that the third and fourth defendants owed the plaintiff a duty of care because of their alleged negligent acts.* That cannot be right. *The Court of Appeal erred by taking an overly simplistic view. In our opinion the Court of Appeal had seriously misdirected itself on fact and law in failing to appreciate that the third and fourth defendants must owe a duty of care to the*

A *plaintiff before the court considers whether there has been a breach of the duty of care … This conflates the question of whether there was carelessness on the defendant's part – ie*, a failure to comply with a reasonable standard of conduct – *with the question of duty of care.* Standard is generally considered after a duty of care has been found … (emphasis added)

B **[95]** The fuller extracts of Azahar Mohamed FCJ's judgment in *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441 are set out below:

[89] The above passages are not free from difficulties. *The Court of Appeal seemed to hold that the third and fourth defendants owed the plaintiff a duty of care*
C *because of their alleged negligent acts. That cannot be right. The Court of Appeal erred by taking an overly simplistic view. In our opinion the Court of Appeal had seriously misdirected itself on fact and law in failing to appreciate that the third and fourth defendants must owe a duty of care to the plaintiff before the court considers whether there has been a breach of the duty of care.* The case of *Esser v. Brown* (*supra*), which was cited by learned counsel for the third and fourth
D defendants illustrates this point very well. The Canadian Court of Appeal in this case who overturned the trial judge's finding that a notary (Ms Luoma) who acted for a fraudulent co-owner owed duty of care to the defrauded co-owner (Ms Esser) held:

> 30. As I have already mentioned, the trial judge seemed to hold
E that Ms. Luoma owed the plaintiff a duty of care because of her finding that in the circumstances, Ms. Luoma was careless in ignoring the "red flags" described by the trial judge. With respect, the existence or non-existence of "red flags" seems related more closely to the question of carelessness or standard of care than to the duty of care, which must be considered as a separate question
F of law. In other words, it is not correct, in my respectful opinion, to say that the notary owed a duty of care because there were "red flags". This conflates the question of whether there was carelessness on the defendant's part – *ie*, a failure to comply with a reasonable standard of conduct – with the question of duty of care. Standard is generally considered after a duty of care has been
G found and involves determining whether there were any established rules of her profession, or customary practices, that she failed to follow; or whether the 'warning signs' adverted to by the trial judge should reasonably have aroused her suspicion. If on examination the court is satisfied that the defendant's actions fell below that of a competent notary, then (assuming both a duty of
H care and a causal link between her conduct and the plaintiff's loss), liability will be imposed …

[90] In *Burmeister v. O'Brien* (*supra*), the New Zealand High Court held that the solicitor (Mr Henley-Smith) who acted for the fraudsters (O'Briens) did not owe a duty of care to the defrauded plaintiffs (Burmeisters). In
I this respect, the High Court held:

> [223] I have no doubt that Mr Henley-Smith did not act in accordance with good professional practice when he accepted the blank transfer signed by the Burmeisters, filled it in with their names on his purchaser client's instructions without further inquiry, and then proceeded to sign the transfer correct as solicitor for the O'Briens, and the discharge of mortgage correct as solicitor for the Burmeisters. Rather, he should have refused to take any steps and required the documentation to be referred back to the Burmeisters, for them or their solicitors to fill in the documents and provide him with the necessary details.
>
> [224] However, *these errors cannot in themselves lead to the creation of a duty of care. The fact that Mr Henley-Smith may have breached the standards of proper professional conduct does not in itself create a cause of action in negligence.*
>
> [91] Reverting to the rival contentions of the parties, it must be emphasised that as against the third and fourth defendants, the plaintiff's claim was based on the tort of negligence. *In a claim based on the tort of negligence, it must first be shown that the defendant owed a duty of care, as a legal obligation, to the plaintiff and once the duty existed, the plaintiff must show that the defendant had breached it.* (emphasis added)

[96] Therefore, the first plaintiff bears the burden to prove that a duty of care is owed to him as a father of the deceased. In our case, the first plaintiff contends that the first defendant owes a duty of care to him as the father of the deceased when doing the autopsy. However, no cases on point were produced in support of the contention.

[97] There are no reported Malaysian cases on this issue according to counsel. However, there are two cases from American courts on point.

US Cases

[98] In *LeJeune v. Causey* Court of Appeal of Louisiana, first circuit March 11, 1994, Rendered No. 93 CA 0455, the parents sued the Coroner for negligence in failing to investigate their daughter's death or perform an autopsy.

[99] The trial court sustained the Coroner's defence that he owes no duty of care to the parents.

[100] In affirming, the Court of Appeal of Louisiana agreed that the Coroner did not owe a duty to the parents. The court explained that, although the statutes governing the Coroner's office did require the Coroner to investigate accidents and perform an autopsy in cases where a crime is suspected, any duty the office owed was a duty to the state, not the private individuals, for the welfare of society and in the interest of public justice.

[101] Similarly, in *Lawyer v. Kernodle* United States Court of Appeals for the Eighth Circuit September 12, 1983, submitted; November 16, 1983, Decided No. 83-1301, the United States Court of Appeals for the Eighth Circuit dismissed a negligence suit filed by the husband of the deceased wife on the ground no duty of care was owed.

[102] In my view, the United States courts' reasoning in *LeJeune v. Causey* and *Lawyer v. Kernodle* are equally applicable in Malaysia and should be followed here.

[103] I set out my reasons below based on how the law of negligence is applied whenever a novel fact situation arises for the court's consideration of whether a duty of care should be imposed.

[104] I begin with a short review of the genesis of the law of negligence and its subsequent evolution.

The Genesis And Evolution Of The Law Of Negligence In England And Malaysia

English Cases

[105] The modern law of negligence in common law jurisdictions started with the ground-breaking House of Lords' decision in *Donoghue v. Stevenson* [1932] AC 562. Lord Atkin formulated what is now known as the famous "neighbour principle" in establishing the classical test for the existence of a duty of care in the tort of negligence.

[106] Inspired by the Parable of the Good Samaritan in the Gospel of Luke, Lord Atkin held:

> The rule that you are to love your neighbour becomes in law: You must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

([1932] AC 562, HL at 580). (See also *Law in Literature and Literature in Law – A Study in Creativity* by Justice Leong Wai Hong July [2022] JMJ 30).

[107] Relying on this "love your neighbour principle", the common law courts developed the law of negligence in a piecemeal and variable manner. This led to great uncertainty and inconsistency in the law. The law hates uncertainty.

[108] To tame this unruly horse, Lord Wilberforce attempted "in *Anns v. Merton London Borough Council* [1978] AC 728, 751 to 752 to lay down an approach which could be applied in all situations in order to determine the existence of a duty of care. That approach had two stages: first, it was necessary to decide whether there was a *prima facie* duty of care, based on the foreseeability of harm, and secondly, in order to place limits on the breadth of the first stage, it was necessary to consider whether there were reasons of public policy for excluding or restricting any such *prima facie* duty. That approach had major implications for public authorities, as they have a multitude of functions designed to protect members of the public from harm of one kind or another, with the consequence that the first stage enquiry was readily satisfied, and the only limit to liability became public policy". (See *Robinson (Appellant) v. Chief Constable of West Yorkshire Police (Respondent)* [2018] UKSC 4 Lord Reed (with whom Lady Hale and Lord Hodge agree) para. 22).

[109] "*Anns* led to a period during which the courts struggled to contain liability, particularly for economic loss unassociated with physical damage or personal injury, and for the acts and omissions of public authorities. Commenting extra-judicially during that period, Lord Oliver of Aylmerton said that "what has been seen as a principle of *prima facie* liability has been prayed in aid in subsequent cases to justify claims for damages which have become progressively more divorced from common sense and as placing on the defendant a burden, sometimes virtually insurmountable, of showing some good reason in 'policy' why he should not be held liable": "*Judicial Legislation: Retreat from Anns*", Third Sultan Azlan Shah Law Lecture (1988). It was in the context of the retreat from *Anns* that emphasis was placed in a number of cases on the concept of "proximity", and on the idea that it must be fair to impose a duty of care on the defendant." (See *Robinson (Appellant) v. Chief Constable of West Yorkshire Police (Respondent)* [2018] UKSC 4 Lord Reed (with whom Lady Hale and Lord Hodge agree) para. 23).

[110] "In *Caparo*, Lord Bridge of Harwich noted that, since *Anns*, a series of decisions of the Privy Council and the House of Lords, notably in judgments and speeches delivered by Lord Keith of Kinkel (including his speech in *Hill v. Chief Constable of West Yorkshire*), had emphasised "the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope" (p. 617)." (See *Robinson (Appellant) v. Chief Constable of West Yorkshire Police (Respondent)* [2018] UKSC 4 Lord Reed (with whom Lady Hale and Lord Hodge agree) para. 24).

[111] From the high-water mark of *Anns v. Merton London Borough Council* [1978] AC 728, 751-752 Lord Wilberforce to the retreat in *Caparo Industries plc v. Dickman* [1990] 2 AC 605, 617 to 618 Lord Bridge of Harwich, the law of negligence has indeed turned a full circle!

[112] The preferred test now is that the law of negligence should develop novel categories of negligence incrementally and by analogy with established categories. (See Brennan J in the High Court of Australia in *Sutherland Shire Council v. Heyman* (1985) 60 ALR 1, 43 to 44, *Caparo Industries plc v. Dickman* [1990] 2 AC 605, 617 to 618 Lord Bridge of Harwich and *Robinson (Appellant) v. Chief Constable of West Yorkshire Police (Respondent)* [2018] UKSC 4 Lord Reed (with whom Lady Hale and Lord Hodge agree) para. 25).

[113] Lord Reed concludes his analysis in *Robinson (Appellant) v. Chief Constable of West Yorkshire Police (Respondent)* [2018] UKSC 4 Lord Reed (with whom Lady Hale and Lord Hodge agree) as follows:

> 26. Applying the approach adopted in *Caparo, there are many situations in which it has been clearly established that a duty of care is or is not owed:* for example, by motorists to other road users, by manufacturers to consumers, by employers to their employees, and by doctors to their patients. As Lord Browne-Wilkinson explained in *Barrett v. Enfield London Borough Council [2001] 2 AC 550, 560, "Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company ... that decision will apply to all future cases of the same kind".* Where the existence or non-existence of a duty of care has been established, a consideration of justice and reasonableness forms part of the basis on which the law has arrived at the relevant principles. It is therefore unnecessary and inappropriate to reconsider whether the existence of the duty is fair, just and reasonable (subject to the possibility that this court may be invited to depart from an established line of authority). Nor, a *fortiori,* can justice and reasonableness constitute a basis for discarding established principles and deciding each case according to what the court may regard as its broader merits. Such an approach would be a recipe for inconsistency and uncertainty …
>
> 27. *It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised.* Following *Caparo*, the characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is "fair, just and reasonable". As Lord Millett observed in *McFarlane v. Tayside Health Board* [2000] 2 AC 59, 108, the court is concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases. But it is also "engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper".
>
> …

29. Properly understood, *Caparo* thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable. In the present case, however, the court is not required to consider an extension of the law of negligence. All that is required is the application to particular circumstances of established principles governing liability for personal injuries. (emphasis added)

Malaysian Cases

[114] Malaysian courts have accepted the recent developments of the law of negligence as set out in the English and Australian courts.

[115] Therefore, in the ordinary run of cases, Malaysian courts will consider what has been decided previously and follow these precedents.

[116] For novel cases, the test is as set out by Azahar Mohamed FCJ in *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441 where His Lordship said:

[92] For the establishment of a duty of care in tort, the preferred test in Malaysia is the three-fold test of foreseeability, proximity and policy considerations (See *Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal* [2018] 6 CLJ 683). We note that the Court of Appeal in the present case did not examine this point. In *Lok Kok Beng & 49 Ors v. Loh Chiak Eong & Anor* (*supra*), this court set out the approach for imposing a duty of care as follows:

> [44] To put it in a nutshell the preferred test is the three fold test, where the requirements of foreseeability, proximity and policy considerations must exist in any claim for negligence. The three fold test has been recognised by the House of Lords in *Caparo Industries plc v. Dickman* [1990] 2 AC 605, as the elements giving rise to a duty of care. In the judgment of Lord Bridge in *Caparo* at pp. 617-618, His Lordship said that:
>
> > What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

[117] In *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441, the Federal Court was dealing with a novel issue that had not been decided by Malaysian courts. Ultimately, the Federal Court decided that a court should not impose a duty of care on solicitors who acted for a fraudster owner of land who sold the said lands, towards the real owner of the land, as there was no foreseeability, no proximity and there were policy considerations against imposing such a duty. (See Held 1b).

Application Of Law To The Facts Of The Present Case

[118] The issue of whether the first defendant owes a duty of care to the first plaintiff as the father of the deceased when doing the autopsy is a novel issue in Malaysia. There are no decided cases.

[119] As I have stated earlier, in my view, the United States courts' reasoning in *LeJeune v. Causey* and *Lawyer v. Kernodle* that no duty of care is owed to the parents of the deceased by the doctor are equally applicable in Malaysia and should be applied here.

[120] On the question of foreseeability, was it foreseeable that the first defendant's act or omission when doing the autopsy might cause the first plaintiff to suffer losses? Viewed objectively, that question is in the negative.

[121] In Malaysia, the CPC governing the autopsy procedure requires the police to investigate suspicious deaths and a medical officer to perform an autopsy on a deceased in cases where a crime in suspected. Any duty the police officer and medical officer owed was a duty to the state, not the private individuals, for the welfare of society and in the interest of public justice.

[122] Further, the CPC has provided recourse to the first plaintiff or any party dissatisfied with the autopsy conducted. This is because pursuant to s. 335(2) of the CPC, a Magistrate holding an inquiry can issue an order to a medical officer to make a second post-mortem examination of the body, and may for that purpose order the body to be exhumed.

[123] On whether there is sufficient legal proximity between the first plaintiff and the first defendant for a duty of care to arise in a case where the first plaintiff only suffered pure economic loss one of the factors that a court should consider is the principle of voluntary assumption of responsibility (by the first defendant) and reliance (by the first plaintiff).

[124] In *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441, Azahar Mohamed FCJ said:

> [94] The next important issue for determination is whether there is sufficient legal proximity between the plaintiff and the third and fourth defendants for a duty of care to arise. *In assessing whether there was sufficient legal proximity between the parties in a case where the plaintiff only suffered pure*

economic loss (as in the present case), one of the factors that a court should consider is the principle of voluntary assumption of responsibility (by the defendant) and reliance (by the plaintiff). This court in *Lok Kok Beng & 49 Ors v. Loh Chiak Eong* explain this as follows:

> [45] The most difficult ingredient to prove in establishing a duty of care is the requirement of sufficient proximity between the claimant and the defendant. The court would have to look at the closeness of the relationship between the parties and other factors to determine sufficient proximity based on the facts and circumstances of each case. These factors are likely to vary in different categories of cases. The fact that damages sought by the claimant is pure economic loss not flowing from personal injury or damage to the property is also a factor to be considered. As has often been acknowledged, a more restricted approach is preferable for cases of pure economic loss. As such, the concepts of voluntary assumption of responsibility and reliance are seen as important factors to be established for purposes of fulfilling the proximity requirement. *The reason for a more stringent approach taken in the claims involving pure economic loss is because such loss might lead to an indeterminate liability being imposed on a particular class of defendants, thus leading to policy issues.*
>
> …
>
> 96 …On the contrary, *the reasonableness of his reliance on it is,* as I have explained, *central to the concept of an assumption of responsibility.*
>
> (emphasis added)

[125] In the instant case, there was no voluntary assumption of responsibility by the first defendant and no reasonable reliance by the first plaintiff. This is because in Malaysia, the CPC governing the autopsy procedure requires a medical officer to perform an autopsy on a deceased in cases where a crime in suspected. The autopsy was not conducted by the first defendant at the request of the first plaintiff. The first plaintiff does not pay the first defendant to do the autopsy.

[126] Thus, there is no legal proximity between the first plaintiff and the first defendant for a duty of care to arise.

[127] On the third test of policy considerations, there are policy considerations against imposing a duty of care on the first defendant towards the first plaintiff.

[128] As I have stated earlier, in Malaysia, the CPC governing the autopsy procedure requires a medical officer to perform an autopsy on a deceased in cases where a crime in suspected. The autopsy was not conducted by the first defendant to find out the cause of death at the request of the first plaintiff.

[129] As held by the Court of Appeal of Louisiana in *LeJeune v. Causey*, any duty the first defendant owed was a duty to the state, for the welfare of society and in the interest of public justice. Not to private individuals like the first plaintiff.

A Answer On Agreed Issue (iv)

[130] In conclusion on agreed issue (iv), I hold that the first defendant owes no duty of care to the deceased and to the father of the deceased when conducting an autopsy. As no duty is owed, the issue of negligence does not arise and thus the first defendant cannot be said to be negligent when
B conducting the autopsy on the deceased.

Agreed Issue (v) – Whether The Second And Third Defendants Had Been Negligent, Derelict In Their Duties In Not Ensuring A Competent, Qualified And Professional Person Had Conducted The First Post-mortem On The Deceased Instead Of The First Defendant?
C

[131] For the same reasons, no duty of care is owed by the first defendant to the father of the deceased when conducting an autopsy, I hold that the second and third defendants also owe no duty of care to the father of the deceased.

D **[132]** Under Malaysian law, before an act is said to be negligent, there must exist a duty to the individual complaining. Since no duty is owed, I hold that the second and third defendants had not been negligent or derelict in their duties.

E *Agreed Issue (vi) – Whether The Fourth Defendant Had Been Negligent In Investigating All The Facts And Circumstances Of The Deceased's Suspicious Death*

The Plaintiffs' Contention

[133] In respect of the issue of whether a duty of care is owed by the investigating officer/fourth defendant/DW2 to the deceased, the first
F plaintiff has confirmed his claim against the fourth defendant is as the father of the deceased.

[134] This is what was stated by the first plaintiff, quote "that on the perusal of the plaintiff's pleadings, this present suit is one of negligence and is brought by the plaintiff as the lawful father to the deceased. Therefore, the
G defendants' submissions on whether the defendants owed a duty of care to the deceased has been nullified and irrelevant." Unquote. (See plaintiffs' written submission in reply para. 54).

[135] For authorities on the existence of a duty of care owed to the first
H plaintiff as the father of the deceased, the first plaintiff cites *Selvi Narayan & Anor (Administrators Of Estate Of Chandran Perumal; Deceased) v. Koperal Zainal Mohd Ali & Ors* [2017] 5 CLJ 84; [2017] 5 MLRH 475 Nantha Balan J which was upheld on appeal and reported as *Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Anor* [2021] 6 CLJ 157; [2021] 3 MLRA 424.
I

[136] On facts showing negligence, the first plaintiff contends that the investigations by the fourth defendant/DW2 had been "shoddy". His basis is that DW2 had only taken three pictures of the deceased (see p. 82 of the CBD). He alleged DW2 also did not even take pictures of the deceased's remains during the first post-mortem. He alleged DW2 also failed to investigate the cause of the allegedly faulty rear doorknob of the deceased's quarters. DW2 not only failed to take pictures of the so-called faulty doorknob but also failed to record this crucial fact in his investigation diary. DW2 further failed to investigate the last phone calls on the deceased's personal phone. DW2 failed to interview the deceased's parents, neighbours and his colleagues for any clue into the deceased's death to affirmatively rule out any possibility of criminal elements. DW2 failed to investigate the amount of people which have been said to have access to the deceased's quarters. DW2 also failed to appraise the deceased's family once every three months with updates on the investigations. (See plaintiff's written submissions paras. 82 to 91).

The Defendants' Contention

[137] The fourth and fifth defendants contend that they do not owe a duty of care to the deceased and the first plaintiff as the father of the deceased. The fourth and fifth defendants rely on *Alexandrou v. Oxford* [1993] 4 All ER 328 UK CA (see defendants' written submissions paras. 110 to 111).

[138] The fourth and fifth defendants also rely on *Zulkiflee SM Anwar Ulhaque & Anor v. Arikrishna Apparau & Ors* [2013] 1 LNS 1264; [2014] 3 MLJ 553 (see defendants' written submissions para. 124).

[139] In any event, they contend there was no negligence in the investigation. They also contend it all depends on the type of cases and facts of the cases. The direction of the investigations also depends on the information available. The fourth defendant went to the quarters and investigated the crime scene. The deceased was sent for post-mortem. PW2 statement was recorded. In this case, there was no foul play found based on the investigation. In addition to that, there were no suspicious events or people related to the deceased reported to the police. (See defendants' written submissions paras. 116 to 123).

Analysis Of The Court

[140] In respect of agreed issue (vi), the first plaintiff has stated that his claim against the fourth defendant/the investigating officer/DW2 for negligence is as the father of the deceased.

[141] As I have earlier held that the first plaintiff's claim is not pleaded as the father of the deceased but pleaded as a claim filed on behalf of the estate of the deceased, this would mean that the first plaintiff has no valid claim against the fourth defendant.

[142] However, for the purposes of completeness and for an appeal, if any, from my decision, I shall still consider agreed issue (vi) on the basis the first plaintiff has brought his claim in his personal capacity as the father of the deceased.

Is There A Duty Of Care Owed By The Fourth Defendant To The First Plaintiff As The Father Of The Deceased?

[143] Under Malaysian law, as I have stated earlier above, before a careless act can be said to be negligent, there must first exist a duty owed to the individual complaining.

[144] I have set out the rational as explained by Azahar Mohamed FCJ in the Federal Court case of *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441 when I discussed agreed issue (iv) above. I do not propose to repeat them here.

[145] So, the issue is whether the fourth defendant owes a duty of care to the first plaintiff as the father of the deceased in investigating all the facts and circumstances of the deceased's death.

[146] There are no direct Malaysian cases on this issue according to counsel.

[147] The first plaintiff relies on *Selvi Narayan & Anor (Administrators Of Estate Of Chandran Perumal; Deceased) v. Koperal Zainal Mohd Ali & Ors* [2017] 5 CLJ 84; [2017] 5 MLRH 475 Nantha Balan J which was upheld on appeal and reported as *Koperal Zainal Mohd Ali & Ors v. Selvi Narayan (Pentadbir Bersama Estet Dan Tanggungan Chandran Perumal, Si Mati) & Ano*r [2021] 6 CLJ 157; [2021] 3 MLRA 424.

[148] In my view, *Selvi Narayan* is not an authority on point. Firstly, the plaintiffs in *Selvi Narayan* (see para. 13 HC judgment) were suing as administrators of the estate of the deceased, which is not the case here.

[149] Secondly, Justice Nantha Balan was dealing with the issue of whether a duty of care was owed to a detainee by the police who had detained him and who had died while in police custody. This is clear from his thorough and succinct judgment:

> [128] In my view, both under common law and under statute, *there is a duty of care to ensure that the detainee is not harmed by the police* or by other detainees or that they do not harm themselves. Insofar as the common law is concerned, the principle is well established by the cases referred to above and it is trite that detaining authorities do owe a duty of care to ensure that the detainees/prisoners are healthy and are given proper medical care during the period of incarceration. There is also a duty to ensure that the detainees are not harmed by the detaining authorities or by other inmates or even self-harm or suicide. In this regard, it is relevant to refer to the judgment of Lord Bingham of Cornhill in *Amin, R (on the*

application of) v. Secretary Of State For The Home Department [2003] UKHL 51 [2003] 4 All ER 1264, [2004] UKHRR 75, [2004] 1 AC 653, [2004] AC 653, [1998] 1 WLR 972, [2003] UKHL 51, 15 BHRC 362, (2004) 76 BMLR 143, [2003] 3 WLR 1169, [2004] HRLR 3 which lucidly illustrates the general duty of care that is imposed on the police or prison authorities. In this context, it is necessary to acknowledge that the late Lord Bingham has been one of the greatest proponents of the rule of law in recent times. He drew inspiration from Indian jurisprudence and said:

A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under arts 1 and 2 of the Convention. This means that a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it. But the duty does not stop there. The state owes a particular duty to those involuntarily in its custody. As Anand J succinctly put it in *Nilabati Behera v. State of Orissa* [1993] 2 SCC 746 at 767:

There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life.

Such persons must be protected against violence or abuse at the hands of state agents. They must be protected against self-harm: *Reeves v. Commissioner of Police of the Metropolis* [2000] 1 AC 360. Reasonable care must be taken to safeguard their lives and persons against the risk of avoidable harm. (emphasis added)

[150] The fourth and fifth defendants rely on *Alexandrou v. Oxford* [1993] 4 All ER 328 UK CA (see defendants' written submissions paras. 110 to 111). The plaintiff's clothing shop was burgled. The burglars' entry activated the shop's exterior and interior burglar alarms and also a recorded telephone message to the local police station stating that the alarm had been activated. Two police officers promptly attended the scene, but failed to inspect the rear of the shop where the burglars had forced entry. Some hours later, a substantial quantity of goods was removed from the shop. The plaintiff sued the chief constable for the value of the goods stolen, alleging that the police had been negligent by, *inter alia*, failing to take adequate precautions to discover why the alarm had been activated and in assuming that it was a false alarm. At the trial of the action, the judge found that the theft would have been prevented if the police officers had properly inspected the rear of the premises and that the police had thereby been in breach of a duty of care owed to the plaintiff.

[151] On appeal, the Court of Appeal allowed the appeal. At held:

On the facts, there was no such special relationship between the plaintiff and the police because the communication with the police was by way of an emergency call which in no material way differed from such a call by any ordinary member of the public and if a duty of care owed to the plaintiff were to be imposed on the police that same duty would be owed to all members of the public who informed the police of a crime being

committed or about to be committed against them or their property. Furthermore, *it would not be in the public interest to impose such a duty of care on the police as it would not promote the observance of a higher standard of care by the police, but would result in a significant diversion of resources from the suppression of crime.* (emphasis added)

[152] In the leading case of *Robinson v. Chief Constable of West Yorkshire Police* [2018] 2 WLR 595, the UK Supreme Court reviewed all the prior English decisions on the duty of care owed by the police to the public.

[153] The facts of this case based on the press summary issued by the Supreme Court are as follows. The appellant was knocked over on a street by a group of men. Two of the men were police officers and the third was a suspected drug dealer (Williams) whom they were attempting to arrest. As the officers struggled with Williams, he backed into the appellant, who was standing close by. She fell over, and the three men fell on top of her, causing her to be injured. The officers had foreseen that Williams would attempt to escape. They had not noticed that the appellant was in the immediate vicinity. The principal question to be decided in the appeal was whether the officers owed a duty of care to the appellant and whether, if they did, they were in breach of that duty.

[154] The High Court held that the officers had been negligent, but that the police were immune from claims against them in negligence. The Court of Appeal found that most claims against the police when engaged in their core functions will fail the third stage of the "*Caparo* test" *ie*, that it will not be fair, just and reasonable to impose a duty of care. The Court of Appeal also found that Williams had caused the harm to the appellant and the case therefore concerned an omission by the police, rather than a positive act. Finally, the Court of Appeal considered that even if the officers had owed the appellant a duty of care, they had not acted in breach of it.

[155] The Supreme Court allowed the appeal. The court drew a distinction between a positive act and an omission. Lord Reed held the police may be under a duty of care to protect an individual from the danger of injury which they have themselves created. The case concerned a positive act, not an omission. The reasonably foreseeable risk of injury to the appellant when the arrest was attempted was enough to impose a duty of care on the officers.

[156] One of the judges, Lord Hughes, referred to vital policy considerations which impose limits on the duty of care which the police owe to individuals. Such considerations are the ultimate reason why there is no duty of care imposed on police officers engaged in the investigation and prevention of crime towards victims, suspects or witnesses. The greater public good requires the absence of any duty of care. Lord Hughes said:

> Whilst there remains a duty of care imposed on police officers not by positive action to occasion physical harm or damage to property which ought reasonably to be avoided, **there is no duty of care towards victims, witnesses or suspects in the manner of the investigation of offences** or the prevention of crime, or to protect individuals from harm caused by the criminal acts of third parties. Where there is a duty of care, whether negligence is proved depends not on whether, with hindsight, the decision the police took was wrong, but on whether in all the circumstances it was reasonable. (emphasis added)

[157] In *Zulkiflee SM Anwar Ulhaque & Anor v. Arikrishna Apparau & Ors* [2013] 1 LNS 1264; [2014] 3 MLJ 553, the appellant had appealed against the dismissal of the appellant's claim for unlawful detention and false imprisonment.

[158] The Court of Appeal had dismissed the appeal on the ground the arrest was lawful and that the evidence on which the arrest was grounded had satisfied the test of reasonable suspicion as stipulated in s. 23 of the CPC, s. 11 of the Sedition Act and s. 20 of the Printing Presses and Publications Act 1984. In all the three provisions, the expressions 'reasonable suspicion', 'reasonably suspected of unlawful possession' and 'reasonably suspected of committing … any offense' are used. These expressions show that the arresting officer must form an opinion to satisfy himself or herself that there is evidence for him or her to reasonably suspect that an offence had been committed and it is committed by the appellants. (See para. 17).

[159] However, the following observations by Abdul Aziz Abd Rahim JCA (delivering judgment of the court) are pertinent to our issue here:

> [49] *In our view police investigation into any complaint or reported crime is entirely within the discretion of the police as to methodology or time taken. There are various factors to be considered such as the seriousness and complexity of the alleged crime, the availability of witnesses to be interviewed and statements to be recorded and the location, accessibility etc of the crime scene. So, it is the police that has to decide how and what investigation to be carried out* and whether arrest and detention of suspect is required to assist the investigation. (emphasis added)

[160] The cases reviewed above *ie*, *Alexandrou v. Oxford* [1993] 4 All ER 328 UK CA, *Robinson v. Chief Constable of West Yorkshire Police* [2018] 2 WLR 595 UK SC and *Zulkiflee SM Anwar Ulhaque & Anor v. Arikrishna Apparau & Ors* [2013] 1 LNS 1264; [2014] 3 MLJ 553 show that the courts are reluctant to impose a duty of care owed by the police to victims, witnesses or suspects in the manner of the investigation of offences or the prevention of crime, or to protect individuals from harm caused by the criminal acts of third parties as these are acts of omission as opposed to positive acts that had hurt a plaintiff.

[161] There are sound public policy reasons not to impose on the fourth defendant a duty of care to the first plaintiff as the father of the deceased in investigating all the facts and circumstances of the deceased's death.

[162] In the premises, on agreed issue (vi), I hold that the fourth defendant owes no duty of care to the first plaintiff as the father of the deceased in investigating all the facts and circumstances of the deceased's death. Thus, the fourth defendant cannot be said to be negligent in investigating all the facts and circumstances of the deceased's death.

Agreed Issue (vii) – Whether The Fifth Defendant Had Failed To Ensure That The Fourth Defendant Had Investigated All The Facts And Suspicious Circumstances Of The Deceased's Death?

[163] For the same reasons no duty of care is owed by the fourth defendant to the father of the deceased, I hold that the fifth defendant also owed no duty of care to the father of the deceased.

[164] Under Malaysian law, before an act is said to be negligent, there must exist a duty to the individual complaining. Since no duty is owed, I hold that the fifth defendant had not been negligent to ensure that the fourth defendant had investigated all the facts and circumstances of the deceased's death.

Agreed Issue (viii) – Whether The Sixth Defendant Is Vicariously Liable For All The Acts And Or Omissions Of The First, Second, Third, Fourth And Fifth Defendants?

[165] As I have held that the first, second, third, fourth and fifth defendants are not liable to the first plaintiff, the sixth defendant is not vicariously liable to the first plaintiff.

Agreed Issue (ix) – Whether The Plaintiffs' Claim Against The Defendants Is Barred By Limitation Under s. 2 Of PAPA?

The First Plaintiff's Contentions

[166] The first plaintiff contends that:

(i) the defendants cannot raise the defence of limitation under s. 2 of PAPA as it was not pleaded in the defence;

(ii) even if the defence of limitation can be relied on although not pleaded in the defence, the first plaintiff's claim is not time-barred as it falls squarely within the ambit of the second limb of s. 2(a) of PAPA; and

(iii) the defendants' failure to cross-examine the first plaintiff on the issue of limitation amounts to an admission to the unchallenged fact in issue. The defendants are no longer disputing the fact that the suit had been filed within time based on their failure to challenge the plaintiff on this point. (See the Federal Court case of *Karun Klasik Sdn Bhd v. Tenaga Nasional Bhd* [2023] 3 CLJ 175; [2023] 2 MLRA 493).

The Defendants' Contentions

[167] The defendants disagree with the first plaintiff's contentions.

Court's Analysis

The Law On Whether The Defence Of Limitation Under s. 2 Of PAPA Can Be Relied On By A Defendant Although Not Pleaded In The Defence

[168] Section 2 of PAPA reads as follows:

> 2. Protection of persons acting in execution of statutory or other public duty
>
> Where, after the coming into force of this act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of **or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;** (emphasis added)

[169] I consider it settled law that:

(i) a defendant need not plead the limitation defence under s. 2 of PAPA and s. 7(5) of the Civil Law Act in order to rely on these two sections to dismiss a suit. This is because the terms of limitation in these two sections are absolute and contain no exceptions.

(ii) it is only when a defendant wants to rely on the defence of limitation under the Limitation Act 1953 that he must plead the limitation defence. This is because the terms of limitation in the Limitation Act 1953 are not absolute but contain exceptions. Further, s. 4 of the Limitation Act states that limitation under the Limitation Act shall not operate as a bar unless specially pleaded as a defence.

(See *Tasja Sdn Bhd v. Golden Approach Sdn Bhd* [2011] 3 CLJ 751; [2011] MLJU 067 at [25] to [26] FC James Foong FCJ, *Lee Cheng Yee v. Tiu Soon Siang & Anor* [2004] 1 CLJ 1 Pajan Singh Gill JCA; and *Kuan Hip Peng v. Yap Yin & Anor* [1964] 1 LNS 69; [1965] 1 MLJ 252 Thomson LP at held 2 and 3).

[170] The first plaintiff reliance on *Dato' Ahmad Johari Tun Abdul Razak v. A Santamil Selvi Alau Malay & Ors And Other Appeals* [2020] 7 CLJ 588; [2020] 4 MLRA 565 is misconceived. ("*Dato' Ahmad Johari*"). *Dato' Ahmad Johari* is a striking out based on s. 6 of the Limitation Act and not PAPA. This is clear from the judgment:

A [67] It is our considered view that the case of *Tasja* (*supra*) stands for the proposition that in order to strike out on the basis of limitation, a defendant must first plead limitation in a Defence. This the defendants had done. **Once the defendants had expressly pleaded the defence of limitation under s. 6 of the Limitation Act 1953,** the burden of proving that the action was brought within the limitation period lies with the
B plaintiff … (emphasis added)

[171] The first plaintiff's reliance on *Saiman Umar v. Lembaga Pertubuhan Peladang* [2015] 9 CLJ 153; [2015] 6 MLRA 248 is also misconceived. ("*Saiman Umar*"). *Saiman Umar* stands for the general proposition that the court should not decide on an issue that was not pleaded by the parties. It
C is not a case on the specific issue whether the defence of limitation under s. 2 of PAPA must be pleaded or not in the defence. This is clear from the judgment:

[37] In refuting the contention of the plaintiff that an Investigation Committee had in fact been established, learned counsel for the
D defendant submitted that in the first place the approach taken by the plaintiff in the present case differed entirely from his pleaded claim. Learned counsel referred to para 22 the plaintiff's statement of claim, which read: "Plaintiff menyatakan bahawa Tindakan defendan telah melanggar peruntukan 28 Peraturan-Peraturan Pegawai LPP (Kelakuan
E Tatatertib 1994) iaitu defendan gagal menubuhkan jawatankuasa siasatan dan gagal memanggil saksi-saksi untuk diperiksa dan disoalbalas."

[38] *He pointed out that the plaintiff's pleaded claim was that the defendant had breached reg. 28(4) of the Disciplinary Rules* when it failed to establish an Investigation Committee for the purpose of obtaining further clarification by way of examining witnesses. *To put the point differently, the plaintiff's*
F *pleaded case was about the non-application of reg. 28 of the Disciplinary Rules, whereas the plaintiff's position before this court was that an Investigation Committee under reg. 28 was established and that he was not called upon to attend it.*

[39] To support his submission that a court should not decide an issue that is not pleaded, he brought to our attention the case of *Yew Wan Leong*
G *v. Lai Kok Chye* [1990] 1 MLRA 327.

[40] In our view, there is merit in the submissions of learned counsel for the defendant. It is a well-settled legal principle that the court should not decide on an issue that was not pleaded by the parties as had been decided in *Yew Wan Leong v. Lai Kok Chye* (*supra*) where the Supreme
H Court cited *Janagi v. Ong Boon Kiat* [1971] 1 MLRH 360 and agreed with the following passage of Sharma J which stated: "The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties, it is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it
I is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

> [41] We should remind ourselves that parties to an action are bound by their own pleadings. It is therefore necessary to make the point that the court is also bound by the pleadings in as much as the parties themselves. The most important purpose of pleadings is to plead reasonable cause of action, define the issues of fact and questions of law to be determined by the court. It is a valid argument to make that the court is constrained to decide an action on which no issue has been raised by the parties in their respective pleadings (see: *Ambank (M) Berhad v. Luqman Kamil Mohammed Don* [2012] 3 MLRA 459 and *Victory Avenue Mfg (M) Sdn Bhd v. Matsushita Electronic Devices (M) Sdn Bhd* [2009] 8 MLRH 731).
>
> (emphasis added)

[172] Therefore, I am of the view the defendants can rely on the defence of limitation under s. 2 of PAPA although not pleaded in the defence.

Whether The First Plaintiff's Claim Is Not Time-barred As It Falls Squarely Within The Ambit Of The Second Limb Of s. 2(a) Of PAPA?

The First Plaintiff's Contentions

[173] The first plaintiff further argues that even if the defence of limitation can be relied on although not pleaded in the defence the first plaintiff's claim is not time-barred as it falls squarely within the ambit of the second limb of s. 2(a) of PAPA. The second limb reads:

> 2[a] the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, **in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.**
>
> (emphasis added)

[174] In respect of the claim against the first defendant for negligent autopsy, the first plaintiff submits (plaintiff's submissions in reply at para. 91), quote, "that *the first post-mortem conducted on 18 November 2010 in fact did not disclose any negligence and/or any wrongdoing on the defendants' part at that material time. In the circumstances, it cannot be argued that the act, neglect or default complained of as per the PAPA Act arose on the 18 November 2010.* It is submitted that the act, neglect or default complained of in this case is the entire investigation process into the deceased's death, of which the first post-mortem forms a part of." Unquote. (emphasis added)

[175] In respect of the claim against the fourth defendant for negligent investigation, the first plaintiff submits (plaintiff's submissions in reply at para. 108), quote, "The act, neglect or default of the defendants in investigating the death of the deceased only arose upon the decision of the investigation officer in not wanting to pursue the investigation any further. The police wrote:

> Setelah meneliti dan melakukan penyiasatan awal terhadap repot tersebut, ianya adalah satu kes di bawah kesalahan yang tidak boleh ditangkap. Tiada siasatan akan dijalankan.

The Defendants' Contentions

[176] The defendants disagree with the first plaintiff's contentions.

Analysis Of The Court

Observations On The Right Of A Defendant To Run A Defence Of Limitation

[177] I begin by making some observations on the right of a defendant to run a defence of limitation and how a court should approach the fairness or perceived unfairness of a defence of limitation. If a defendant is able to rely on a defence of limitation the court must strike out the suit irrespective of the technical nature of such a defence and even if it is unfair to a plaintiff who otherwise has a good claim on the merits. This is because justice is a two-way street. What is good for the goose is good for the gander.

[178] In *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69; [1991] 1 MLJ 409, Hashim Yeop A Sani CJ (Malaya) said at p. 76 (CLJ): pp. 413 to 414 (MLJ):

> *The doctrine of limitation is said to be based on two broad considerations. Firstly, there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.*
>
> The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim *interest reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. *The rationale of the limitation law should be appreciated and enforced by the courts.* (emphasis added)

[179] In *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56; [1983] 1 MLJ 1, Lord Brightman (delivering the judgment of the Board) said at p. 5:

> When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he had been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.

[180] In *Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 6 CLJ 245; [2007] 7 MLJ 1 Nik Hashim FCJ said at held 3:

> **Section 2(a) of the Act is mandatory in its terms. The word 'shall' is used twice in that section indicating that the 36 months period in respect of time is a mandatory requirement and it cannot be abridged.** Time starts to run from the act complained of and not the communication of the decision. The 'act' in the present case was the decision of the Board

> dismissing the appellant's appeal. This decision was made on 19 October 1992 as stated in the letter dated 26 November 1992. Hence, the time to file the action ran from the date of the decision and the last day to file it would be on 18 October 1995 and not on 25 November 1995. If time were to run from the date of communication of the decision on 26 November 1992 and not the date when the decision was made on 19 October 1992, then the provision in s 2(a) of the Act would have said so in the section. But there was no such provision. The appellant's action was time barred as he was 39 days late when he filed the action (see paras 20-21). (emphasis added)

Whether The Claim Against The First Defendant For Negligent Autopsy Is Time-Barred Under s. 2 Of The PAPA

[181] I now examine whether the claim against the first defendant for negligent autopsy is time-barred under s. 2 of the PAPA.

[182] The claim against the first defendant is for negligent autopsy. So, the act complained of under s. 2 of the PAPA is the autopsy. The autopsy was conducted on the deceased on 18 November 2010 by the first defendant. (Pages 37 to 40 of the CBD). Therefore, time starts to run from 18 November 2010 and the first plaintiff has 36 months to file a writ. As the writ was only filed on 11 May 2018 the claim against the first to third and sixth defendants in respect of the alleged negligent autopsy is barred by s. 2(a) of the PAPA.

Whether The Claim Against The Fourth Defendant For Negligent Investigation Is Time-Barred Under s. 2 Of The PAPA?

[183] In respect of the claim against the fourth defendant for negligent investigation, the first plaintiff submits (plaintiff's submissions in reply at para. 108), quote, "The act, neglect or default of the defendants in investigating the death of the deceased only arose upon the decision of the investigation officer in not wanting to pursue the investigation any further. The police wrote:

> Setelah meneliti dan melakukan penyiasatan awal terhadap repot tersebut, ianya adalah satu kes di bawah kesalahan yang tidak boleh ditangkap. Tiada siasatan akan dijalankan.

[184] The letter written by the police is dated 17 August 2016. (B1 p. 54). The first plaintiff asserts "it was only possible to bring an action against the fourth defendant, *ie*, the investigation officer in this case upon his decision on 17 August 2016 that the matter was not going to be investigated further. Clearly, the filing of the present suit on 11 May 2018 would comply with the provisions of s. 2(a) PAPA." (Plaintiff's submissions in reply at para. 115).

[185] I agree with the submissions of the first plaintiff. The act of shoddy investigation is not a single act. It is a series of acts. When you have a series of acts, limitation runs from the date the act, injury or damage ceases. (See

Mak Koon Yong & Anor v. Municipal Councillors, Malacca [1967] 1 LNS 98; [1967] 1 MLRH 628, *Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1997] 2 CLJ 225; [1996] 1 MELR 289, *Ibrahim Mohideen Kutty v. Timbalan Menteri Dalam Negeri & Ors* [2003] 6 CLJ 144; [2003] 2 MLRH 147 and *Shahrudi Abidin v. Datuk Wira Abu Seman Yusop Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri Malaysia & Ors* [2021] 1 CLJ 52; [2020] MLRAU 212).

[186] The acts ended when the police said by letter dated 17 August 2016 (B1 p. 54) that the matter was not going to be investigated further. So, 36 months start from 17 August 2016.

[187] In conclusion, as the writ was filed on 11 May 2018 the claim against the fourth to sixth defendants in respect of the alleged negligent investigation by the fourth defendant is not barred by s. 2(a) of the PAPA.

Whether The Defendants Had Failed To Challenge The Plaintiff On The Issue Of Limitation?

[188] The first plaintiff further alleges, quote, "that the defendants had failed to challenge the plaintiff on the issue of limitation. The defendants failed to cross-examine the plaintiff on whether he had sat on his rights and brought this claim out of time. He relies on *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 2 MLRA 432 CA." unquote. (Plaintiffs' submissions in reply para. 88).

[189] Firstly, factually this allegation is wrong. The defendants did challenge the plaintiff on the issue of limitation and cross-examined the first plaintiff on whether he had sat on his rights and brought this claim out of time. (See defendants' written submission para. 164). This is also clear from the note of proceedings at p. 5 where the first plaintiff/PW1 was cross-examined by SN/defendants' counsel:

> SN Dengan izin Yang Arif … My first question Mr. Joseph I put to you that the claim action for this case and events for this case happened on the year of 2010. Specifically, on 18th November 2010, Correct or Not?
>
> PW1 Ya, correct.
>
> SN And technically it was 8 years before this action has been filed, do you agree?
>
> PW1 Yes.

[190] The first plaintiff/PW1 was also re-examined by counsel for the first plaintiff/MV on the issue of limitation. (See defendants' written submission para. 170). This is also clear from the note of proceedings at p. 29:

> MV Mr. Anthony you were asked this question with regards to 8 years before this trial for this case and you answered "Yes". Would you like to clarify why you said 8 years before you came to court today?

PW1 I came to court after 8 years because there were a lot of proceedings to be done where I was not very sure about the first report given to me. So, I have to go to court. I made a statement, I mean complaint to the police to investigate the case and I wanted to do a Second post-mortem. So, I made a report in Shah Alam that's 2013. Than in 2014 they never gave me any answer for what I have made the report. So, in 2014 I found a counsel to apply an application in the High Court in Alor Setar to examine the body. So, in 2015 I got the order to do the 2nd post-mortem. Than in 2016 I got the report that it was a open verdict and than I had an Inquest in 2016 and it ended in 2017. So, we file a suit in 2018. That's why took me so long to …

[191] Secondly, the first plaintiff's reliance on *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 2 MLRA 432 is misconceived. ("*Sivalingam*"). Unlike our case here, in *Sivalingam,* there was a failure to cross-examine a material fact. That material fact was not put to the other party during cross-examination. This is clear from the judgment:

[14] We now turn to consider the second defect in the judgment of the trial Court. *The learned Judge accepted the evidence of the first defendant upon a critical issue which was never put to the appellant during his cross-examination.*

[15] The main thrust of *the defendants' case was that the plaintiff had requested the first respondent's permission to climb the tree which the first respondent refused. The plaintiff's case, on the other hand, was that he had been instructed by the first defendant to make the climb.* But nowhere in the defence was it alleged that there was such a request as alleged in the evidence. Further and more importantly, it was never put to the plaintiff under cross-examination that such a request had come from him. The trial Judge ought to have taken this failure into account when he came to assess the evidence. But nowhere in his judgment is there any indication that he did so. In *Aik Ming (M) Sdn Bhd v. Chang Ching Chuen & Ors* [1995] 1 MLRA 546; [1995] 2 MLJ 770; [1995] 3 CLJ 639; [1995] 3 AMR 2375, 774, this court when applying the rule in *Browne v. Dunn* [1893] 6 R67 said:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well. (emphasis added)

[192] In conclusion, I am of the view the defendants did challenge the first plaintiff on the issue of limitation.

The Tort Of Misfeasance In Public Office

[193] The first plaintiff asserts that the first and fourth defendants had abused their power and authority as public officers by being negligent and derelict in their respective duties and therefore liable under the tort of misfeasance in public office.

[194] He relies on *Three Rivers District Council & Ors v. Governor And Company Of The Bank Of England (No 3)* [2003] 2 AC 1 and *Tony Pua Kiam Wee v. Kerajaan Malaysia & Another Appeal* [2019] 1 CLJ 365; [2019] 6 MLRA 432).

[195] I note that this is not one of the agreed issues. In any event, I am of the view the tort of misfeasance in public office is not made out. There is no evidence the first and fourth defendants had abused their power and authority as public officers. The first defendant was authorised under the CPC to do the autopsy. The fourth defendant was authorised under the CPC to do the police investigation.

[196] Further, first plaintiff's assertion that, quote, "the first and fourth defendants, had **abused their power and authority as public officers by being negligent** and derelict in their respective duties **and therefore liable under the tort of misfeasance in public office**", unquote, is a misstatement of the law. ("emphasis added").

[197] In order to succeed in a claim for the tort of misfeasance in public office, a plaintiff must prove that a defendant was acting in excess of power. This is because the failure to exercise a power is not in itself wrongful. It cannot be equated with acting in excess of power. The failure to act must be deliberate, not negligent or arising from a misunderstanding of the legal position. The tort is misfeasance in public office, not non-feasance in public office. Thus, the first plaintiff's allegations that the first defendant failed to take certain steps to carry out a proper autopsy and the fourth defendant failed to make certain investigations, even if true, cannot amount to the tort of misfeasance in public office.

[198] This was made clear by Zaharah Ibrahim FCJ in *Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals* [2018] 1 CLJ 585. Zaharah Ibrahim FCJ said:

> [127] What is also clear from the *Three Rivers* case is that misfeasance in public office is not the same as non-feasance in public office. Lord Millet explained:
>
> > ... It is no accident that the tort is misfeasance in public office, not nonfeasance in public office. **The failure to exercise a power is not in itself wrongful. It cannot be equated with acting in excess of power.** The tort is concerned with preventing public officials from acting beyond their powers to the injury of the citizen, not with compelling them to exercise the powers they do have, particularly where they have a discretion whether to exercise them or not.
> >
> > In conformity with the character of the tort, **the failure to act must be** deliberate, **not negligent** or arising from a misunderstanding of the legal position. In my opinion, a failure to act can amount to misfeasance in public office only where (i) the circumstances are such that the discretion whether to act can only be exercised in one

way so that there is effectively a duty to act; (ii) the official appreciates this but nevertheless makes a conscious decision not to act and (iii) he does so with intent to injure the plaintiff or in the knowledge that such injury would be the natural and probable consequence of his failure to act.

[128] There must be **a nexus between the intentional or reckless act and the injury suffered by the person affected by the act,** such that the injury is a consequence of the intentional or reckless act. (emphasis added)

Are Defendants Relying On ss. 5 And 6 Of The Government Proceedings Act 1956?

[199] There remains this last issue I need to address.

[200] These sections are pleaded in the defence at paras. 3, 4, 11, 12 and 14. However, written submissions were made on these sections. This was confirmed during oral submissions before me by learned counsel for the defendants. During oral submissions, learned counsel for the defendants also did not submit on these sections. To all intents and purposes, the defendants have abandoned this point.

Conclusion

[201] My conclusions on the agreed issues and issues that arose during oral and written submissions are as follows.

[202] I am of the view the first plaintiff is only suing as the administrator of the deceased's estate. He is not suing in his personal capacity as the father of the deceased.

[203] On agreed issue (i), it is my view the first defendant is a person properly authorised in law under s. 331 of the CPC to conduct a post-mortem on the remains of the deceased on 18 November 2010.

[204] On agreed issues (ii) and (iii), it is my finding there is nothing wrong in law for the first defendant to do the autopsy on the deceased.

[205] The first plaintiff as administrator of the estate of the deceased cannot rely on ss. 7 and 8 of the Civil Law Act 1956 to sue the first defendant for any breach of duty of care to the deceased (if any) when conducting an autopsy.

[206] On agreed issue (iv), I hold that the first defendant owes no duty of care to the father of the deceased and to the estate of the deceased when conducting an autopsy. As no duty is owed, the issue of negligence does not arise and thus the first defendant cannot be said to be negligent when conducting the autopsy on the deceased wherein he had determined the deceased's cause of death to be "unascertained".

[207] On agreed issue (v), I hold that the second and third defendants owe no duty of care to the father of the deceased and to the estate of the deceased. Since no duty is owed, I hold that the second and third defendants had not been negligent or derelict in their duties.

[208] On agreed issue (vi), I hold that the fourth defendant owes no duty of care to the father of the deceased and to the estate of the deceased when conducting an investigation into the death of the deceased. As no duty is owed, the issue of negligence does not arise and thus the fourth defendant cannot be said to be negligent when conducting an investigation into the death of the deceased.

[209] On agreed issue (vii), I hold that the fifth defendant owes no duty of care to the father of the deceased and to the estate of the deceased. Since no duty is owed, I hold that the fifth defendant had not been negligent or derelict in his duty to ensure that the fourth defendant had investigated all the facts and circumstances of the deceased's death.

[210] On agreed issue (viii), I hold the sixth defendant is not vicariously liable for all the acts and or omissions (if any) of the first, second, third, fourth and fifth defendants.

[211] The defence of limitation under s. 2 of PAPA can be relied on by the defendants although not pleaded in the defence.

[212] I am of the view the defendants did challenge the first plaintiff on the issue of limitation.

[213] On agreed issue (ix), I hold that the first plaintiff's claim against the first to third defendants is barred by limitation under s. 2 of PAPA.

[214] I hold that the first plaintiff's claim against the fourth to sixth defendants is not barred by limitation under s. 2 of PAPA.

[215] The first and fourth defendants are not liable under the tort of misfeasance in public office.

[216] On agreed issue (x), I hold that the first plaintiff is not entitled to damages against the defendants.

Decision

[217] For the reasons above, I dismiss the first plaintiff's suit against the defendants with costs.

[218] I order the first plaintiff to pay costs of RM5,000 to the defendants.

[219] Lastly, I thank counsel for the first plaintiff and Federal Counsel acting for the defendants for their helpful submissions which have greatly assisted me.